MIHARJA DEVELOPMENT SDN. BHD. & 8 ORS.

v.

TAN SRI DATUK LOY HEAN HEONG & 9 ORS. AND ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
DATO' V. C. GEORGE J
[COMPANIES (WINDING UP) NO: D3-28-83-1994 & NO. D3-28-93-94]
6 SEPTEMBER 1994

***COMPANY LAW**: Winding-up - Petitioning the Court without first obtaining the sanction of the nominee shareholders - Whether valid - Shares registered by lender in nominee company - Whether real shareholders are considered contributories - Whether petition an abuse of the process of the Court.*

The first petitioner was at all relevant times the registered proprietor of certain lands and had entered into an agreement with Uncang Emas Sdn. Bhd. (Uncang) for Uncang to develop the lands. The project was executed by the seventh respondent. A loan agreement was entered into with the third respondent and, as security for loan, the borrowers executed a debenture and deposited certain shares, together with duly executed blank memoranda of transfer. The shares were registered in the name of the lender's nominee, MBf Nominees Sdn. Bhd.

The development of the project was undertaken in phases. The directors of the 1st petitioner and Uncang came to realise that the project had suffered losses and that completion of the whole project would still result in a substantial loss. Therefore the said directors considered that the two companies should be wound up. The directors contended that since the project was executed by the seventh respondent, the directors and officers of the seventh respondents were in the circumstances deemed to be the directors of the two companies and they had been acting in the interests of the MBf group of companies to the detriment and prejudice of the two petitioner companies and its members. The directors took it upon themselves without obtaining the sanction of the nominee shareholders to decide at a board meeting to have each of the companies petition the Court to wind up the company. The respondents contended that neither the first petitioner nor Uncang may petition the Court to wind up themselves without the consent of the registered shareholders, the nominee company, which in fact opposes the petitions. They also contended that the petition should be struck off *in limine* on the ground that the alleged real shareholders are not entitled to petition as contributories because they have lost that right by virtue of the nominee company being the registered shareholders of all the issued shares of each of the companies and on the further ground that these petitions and each of them are an abuse of the process of the Court.

Held:

[1] There is significance in the fact that the legislature has specifically provided in s. 254 of the Companies Act 1965 (the Act) for a special resolution of the shareholders and omitted to provide as condition precedent even for an ordinary resolution with reference to s. 217(1) (a) of the Act. If it had been the intention of the legislature that one of the condition precedent to the company taking out a s. 217 petition is that the sanction of the shareholders be obtained, it would have provided for that and could have done so conveniently in s. 217(2) where a number of qualifications to the provision in s. 217(1) are made. The omission must have been a deliberate and considered omission.

[2] It is not desirable that there be a fetter on the directors. While the directors may not cause a company to voluntarily be wound up without a special resolution to do so by the members because there is express provision to that effect in s. 254, they should not be prevented, if they feel that that is the sensible course to take, to move the Court for a winding up order without first obtaining the sanction of the shareholders to do so.

[3] The petitioners had deposited their shares with the lenders as security for the loans. The shares are held by the lender's nominee company who have had the shares registered in their name in their capacity as a nominee company. It has not been suggested they hold the shares otherwise. They only hold the shares nominally; they hold them on trust for the real shareholders. While a company need not, shall not, look behind the share certificates that is not to say that in fact shares cannot be held in trust by one person on behalf of a beneficiary.

[4] It is consistent with the rationale behind s. 217(1) (c) that shareholders whose shares have not been foreclosed, even though the shares have been registered in the name of the pledgee, should come under the exceptions to the rule that registration is a prerequisite to membership and the right of a contributory to apply for a winding order. It is the technicality of the pledgee or its nominees that purports to prevent the real shareholders from exercising their rights as shareholders.

[5] It is not possible to hold that the complaints by the petitioners are baseless or obviously unsustainable. There should be an independent full and critical investigation of the whole of the affairs of the two companies and of the project. To allow the debenture holder to appoint receivers and managers will have the effect of thwarting the right of petitioners to have the company put in the hands of liquidators. The debenture holders should be restrained until the disposal of the petition or further order from appointing receivers and managers.

[Orders accordingly]

Cases referred to:
In re Standard Bank of Australia Ltd. [1898] 24 VLR 304 ***(refd)***
In re Birmacley Products Pty Ltd [1942] ALR 276 ***(refd)***
In re Galway & Salthill Tramways Co. [1918] 1 IR 62 ***(refd)***
Smith v Duke of Manchester [1883] 24 Ch D 611 ***(refd)***
Inkerman Grazing Pty Ltd. [1974-76] 1 ACLR 102 ***(refd)***
Campbell v. Rofe [1932]CLR 258 PC ***(refd)***
Re Rica Goldwashing Co. [1966] 1 All ER 145 ***(not foll)***
Re Othery Construction Ltd. [1979] 11 Ch D 36 ***(not foll)***
Kumagai Sumi Co. Ltd. v Zenecon-Kumagai Sdn. Bhd. [1994] 2 MLJ 789 ***(not foll)***
Re Ah Yee Contractors (Pte) Ltd. [1987] 2 MLJ 590 ***(not foll)***
In re Emmadart Ltd [1979] 1 Ch. 540, 547 ***(refd)***
Re JN2 Ltd. [1978] 1 WLR 183 ***(foll)***

Legislation referred to:
Insolvency Act 1986, s. 2A (UK)
Companies Act 1965, ss. 217 (1)(a)(c)(2), 218(1)(f) (i), 221(1), 254(1)(b), 303(3)
Companies Act s. 257 (Singapore)

Other sources referred to:
Buckley on the Companies Act 13th Edn. [1959] p. 462
Palmers Company Law 22 Edn. [1976] Vol. I p. 891; 24 Edn. [1982] p. 1374
Mcpherson 3rd Edn. p. 111

For the petitioners in both cases - G. Sri Ram, (Joseph Yeo & Edmund Kam with him); M/s. Joseph Yeo

For the 1st, 2nd 7th to 10th respondents in both cases - K.S. Narayanan, (K. Mogan, Heng Fook Seng with him); M/s. Heng & Mogan

For the 3rd respondent - K. S. Narayanan, (Ranjit Singh & Evelyn Khoo with him); M/s. Cheang & Ariff

For the 4th to 6th respondents - K.S. Narayanan, (Tan Chin Toh & Patrick Koo with him); M/s. K.K. Chong Chai & Co.

JUDGMENT

V.C. George J:

The following various applications in these two related matters were with the agreement of Counsel disposed of together, with Counsel referring for the facts and for the position taken by the parties, to the affidavits filed in the petition no. 28-93-94 to be applied *mutatis mutandis* in respect of petition no. 28-83-94 and to each of the said applications being enclosures 4, 10 and 13 in each petition and enclosures 42, 20 and 26 in petition no. 28-83-94 and enclosures 50, 23 and 17 in petition no. 28-93-94.

Miharja Development Sdn. Bhd. (Miharja) was at all relevant times the registered proprietors of certain lands in respect of which they had an agreement with Uncang Emas Sdn. Bhd. (Uncang) for Uncang to develope the lands. These two companies in effect entrusted the execution of the project to one of the MBf Group of companies called MBf Property Services Sdn. Bhd. (the 7th respondent in each of the petitions), the development to be carried out with financing provided by another MBf company called MBf Finance Bhd. (the 3rd respondent in each of the petitions). A loan agreement was entered into with MBf Finance Bhd and security for the repayment of the intended loan and for the due adherence to the terms of the loan agreement was provided which included a debenture and a deposit of shares. The holders of all the issued shares of the two companies (in the case of Uncang Emas it was the 2nd and 3rd petitioners in 28-93-94) had pledged them to the lender with whom they were deposited together with duly executed blank memoranda of transfer. Although the lender had the shares registered in the name of its nominee company MBf Nominess Sdn. Bhd. it was common ground that the shares were continued to be held under the terms of the pledge as security as aforesaid.

The development of the project was to be undertaken in phases. The first two phases were completed or substantially completed and substantial works in respect of the earth works and some of the foundation works in respect of the phase III had been completed when the directors of Uncang (and of Miharja) apparently came to realise the extent of the loss that the project had suffered - some RM51 million, and that completion of the whole project would still result in a substantial loss. As apparently the project was the only business of the two companies and because it was in the opinion of the directors of the companies, based on information given by the 7th respondent, that it was impossible for each of the companies to carry on its business with profits, the directors decided that justice and equity required that each of the two companies should be wound up.

The directors of the two companies also contend that the combined effect of the various agreements they had entered into with MBf Property Services Sdn. Bhd. and the powers of attorney they had granted pursuant to or in relation to those agreements had the effect of MBf Property Services Sdn. Bhd. its directors and officers replacing, as it were, the directors of the petitioner companies in respect of the management and affairs of the petitioner companies. The directors of the two companies further contend that MBf Property Services Sdn.

Bhd. and its directors and officers are in the circumstances deemed to be directors of the two companies and that these deemed directors have been acting in the interests of the MBf groups of companies to the detriment and prejudice of the two petitioner companies and its members.

The shares of the companies being registered in the name of the nominee company, it was not possible for the members in whose names the shares were registered prior to the registration of the nominee company as shareholders (those members are hereinafter referred to as the alleged real shareholders) to hold or take part in a general meeting of either of the companies. The directors named as such in the records of the companies however took it upon themselves without first obtaining the sanction of the nominee shareholders to decide at a board meeting to have each of the companies petition the Court to wind up the company. The alleged real shareholders claim to be contributories and as such purport to join the company, as joint petitioners. The petitions are purported to be brought pursuant to s. 217(a) and (c) on the basis of s. 218(1)(f) and (i) of the Companies Act 1965.

MBf Property Services Sdn. Bhd., MBf Finance Bhd. and various other MBf companies who may be effected by these petitions and various directors of those companies including Tan Sri Datuk Loy Hean Heong have been made respondents to these petitions.

The respondents contend that neither Uncang nor Miharja may petition the Court to wind up themselves without the consent of the registered shareholders, the nominee company, which in fact opposes the petitions. They also contend that the petitions should be struck off *in limine* on the ground that the alleged real shareholders are not entitled to petition as contributories because they have lost that right by virtue of the nominee company being the registered shareholders of all the issued shares of each of the companies and on the further ground that these petitions and each of them are an abuse of the process.

I will first deal with the *locus standi* of a company to petition to wind up itself at the instance of the board of directors without the sanction of the shareholders:

In the State of Victoria, Australia the Courts have construed the article in the articles of association of a company in *pari materia* with article 116 in the articles of association of each of the petitioner companies that provides that:

> The business of the company shall be managed by directors who may exercise all such powers of the company as are not by the Act or by these presents required to be exercised by the company in general meeting, subject nevertheless to any regulations of these presents, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions as may be prescribed by special resolution of the company, but no regulation so made by the company shall invalidate any prior act of the directors which would have been valid if such regulation had not been made. The general powers given by this article shall not be limited or restricted by any special authority or power given to the directors by any other article provided that any sale of the company's main undertaking shall be subject to ratification by the members in general meeting

as being limited for the purpose of conducting the business of the company and not for the purpose of destroying the company. They take the view that the board of directors have no power to present a petition to wind up the company without the support of the shareholders - *In re Standard Bank of Australia Ltd.* [1898] 24 VLR 304; *In re Birmacley Products Pty Ltd* [1942] ALR. 276, The Irish Courts hold the same view - *In re Galway & Salthill Tramways Co.* [1918] 1 IR 62.

Although the old English case *Smith v Duke of Manchester* [1883] 24 Ch. D. 611 also seemed to take a similar view, it would seem that up to the end of 1979 it was the generally accepted English practice to recognise that the board of directors were entitled to present a petition to wind up the company without first obtaining the sanction of the shareholders to do so - See **Buckley on the Companies Act** 13th Ed. (1959) p. 462 and **Palmers Company Law** 22 Ed. [1976] Vol. I p. 891.

This was the position until the end of 1979 when Brightman J delivered the judgment in *In re Emmadart Ltd* [1979] 1 Ch. 540, 547. where he said:

> The Practice which seems to have grown up under which a board of director of an insolvent company presents a petition in the name of the company where this seems to the Board to be a sensible course but without reference to the shareholder is in my opinion wrong and ought no longer to be pursued..... What is stated in **Buckley** to be the law according to Irish authority is in my view equally the law in this country.

In 1986 the Legislature intervened and the English Insolvency Act 1986 specifically provided for the directors to present the petition without reference to the shareholders. In New Zealand also there are statutory provisions to the like effect.

This issue of the *locus standi* in the context, of the board of directors, has apparently never come up before the Malaysian or Singapore Courts and it has now fallen on me to lay down what the Malaysian practise should be.

I agree with Encik Sri Ram leading for the petitioners that *Emmadart* does not lay down any universal principle of law but only reversed a practice. In this context I found myself persuaded by the reference and relevance of s. 303(3) of the Companies Act and to the distinction between s. 217(1)(a) and s. 254(1)(b) of that Act which for convenience are reproduced here:

> Section 217. (1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the petition of -
>
> (a) the company;
>
> Section 254. (1) A company may be wound up voluntarily -
>
> (b) if the company so resolves by special resolution;
>
> Section 303.(3) If in the course of the winding up of a company or in any proceedings against a company it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration of other liabilities, if any, of the company at the time, of the company being able to pay the debt, the officer shall be guilty of an offence against this Act.

My attention was particularly drawn to **Palmers Company Law** Vol. 2 24th Edn. [1982] p. 1374:

> Petitions by the company are not very common; for if a company desires to wind up, it has only to pass a special, or an extraordinary, resolution for voluntary winding up (Insolvency Act, s. 84). However, if the directors find the company to be insolvent owing to matters which ought to be investigated by the Court, it may well be that their proper course is to apply at once on behalf of the company to the Court by petition for a compulsory order.

If the shareholders pass a special resolution the comparatively simple and cheaper procedure for voluntary winding up the company provided by s. 254 can be invoked. If there is such a special resolution there would appear to be no point in invoking the s. 217 procedure for winding up by the Court.

There is I think significance in the fact that the legislature has specifically provided in s. 254 for a special resolution of the shareholders, and omitted to provide as a condition precedent even for an ordinary resolution with reference to s. 217(1)(a). If it had been the intention of the legislature that one of the conditions precedent to the company taking out a s. 217 petition is that the sanction of the shareholders be obtained, it would have provided for that and could have done so conveniently in s. 217(2) where a number of qualifications to the provisions in s. 217(1) are made. The omission must have been a deliberate and considered omission.

I also agree that in the face of s. 303(3) a fetter on the directors is far from desirable. In the New South Wales case of *Inkerman Grazing Pty Ltd.* [1974-76] 1 ACLR 102 at 106. Street J said:

> Not only is there the authority of a course of practice recognized and given effect by Judges in this State and, practical justifications and, indeed, necessities, for recognizing this power in directors. As is pointed out in **Palmer's** textbook, there can well be occasions where the proper course is for directors of a company to apply at once for a winding-up by the Court. It is often only by a procedure of this nature that a company with widespread financial interests affecting a great many actual and prospective creditors, let alone shareholders, can move to protect its creditors and shareholders in the event of a sudden financial crisis developing which leaves it in a position of insolvency.

Unlike Brightman J in *Emmadart*, who had to descend into the arena himself as it were because only one party to the matter before him was represented by Counsel, I have here had the benefit of the learned and well researched submissions of the opposing teams of lawyers each led by an eminent leader of the Commercial Bar in the persons of Encik G. Sri Ram and Encik K.S. Narayanan who have between them covered every possible aspect of the issue. *Inter alia* I take the point that was made that Brightman J does not appear to have been referred to the New South Wales practice and the merits of the practise as set out in the various judgments of the Courts there. He was also not referred to the Privy Council's opinion expressed in 1932 in the Australian case, *Campbell vs. Rofe* [1932]CLR 258. P.C. It had been contended in that case that either article 10 of the company in question or article 117 (in *pari materia* with article 116 in the articles of the two companies here) had provided the directors with the power to take the action that they had taken in respect of which their Lordships of the Privy Council having expressed the view that article 10 provided the power exercised by the directors went on to say at page 265:

> In this view, art. 117, which only purports to confer additional powers, does not include the powers conferred by art. 10; but, if their Lordships had taken a different view as to art. 10, they would have been prepared to hold that art. 117 clearly delegated to the directors power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed,.....

I would echo *Inkerman* (*supra*) and say that it is not desirable that there be a fetter on the directors. While the directors may not cause the company to voluntarily be wound up without a special resolution to do so by the members because there is express provision to that effect in s. 254, they should not be prevented, if they feel that is the sensible course to take, to move the Court for a winding up order without first obtaining the sanction of the shareholders to do so. I would apply the wide (rather than narrow) construction to article 116 recommended by the Privy Council in *Campbell v. Rofe*. I would respectfully share the opinion of the English legislature manifested in the restoration of the English pre-1979 practise and of the New Zealand legislature in sanctioning a similar practise - I would and do lay down that the effect of and the practise in respect of s. 217(1)(a) is and should be that the

directors of a company may petition the Court to wind up the company without having to first obtain the sanction of the shareholders. I have particularly in mind that there could be situations where expediency calls for urgent steps to be taken or where as is the case here, it is not possible to obtain the views of the real shareholders at an EGM because the shares are held as security by a financial institution in whose name they are registered and because of that it appears that it is not possible to obtain the sanction of the shareholders because of the doubt of the status of the alleged real shareholders *vis-a-vis* the shares. It is not difficult to think of other situations obtaining where the directors think it desireable that the company be wound up but the shareholders cannot or cannot expediciously be summoned for an EGM.

The next issue for decision is whether in any event the 2nd and 3rd petitioners in 28-93-94 and the 2nd to 9th petitioners in 28-83-94, who purport to petition the company as contributories can be regarded, in the context, as contributories.

They had deposited their shares with the lenders as security for the loans. The shares are held by the lender's nominee company who have had the shares registered in their name in their capacity as a nominee company. It has not been suggested that they hold the shares otherwise. As their name suggests they only hold the shares nominally; they hold them on trust for the real shareholders. While a company need not, shall not, look behind the share certificate, that is not to say that in fact shares cannot be held in trust by one person on behalf of a beneficiary.

Now, for the respondents it has been submitted with some force in countering the contentions by the plaintiffs that the directors of the 7th respondent should be regarded as deemed directors of the company that that cannot be and is not the position *inter alia* because all that the respondents were and are concerned with is managing the project *albeit* the only project of the companies. They insist that they are not managing either of the companies.

It was submitted that there is nothing in the documents and on the facts that raises the inference of a joint venture or partnership or anything of that like nature.

In **Mcpherson** 3rd Edn. p. 111 it is stated that registration is a prerequisite to membership and the right of a contributory to apply for a winding up order but that there are exceptions to the rule eg. executors of the estate of a deceased shareholder. Our s. 217(1)(c) provides that there can be a petition by:

> a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the official assignee of the estate of a bankrupt contributory.

Re JN 2 Ltd [1978] 1 WLR 183 added to the list an allottee who has a right to be a shareholder.

I think that it is consistent with the rational behind s. 217(1)(c) and *Re JN 2 Ltd.* that to the list should be added shareholders whose shares are pledged or are held as security and the charge on the shares has not been foreclosed, even though the shares have been registered in the name of the pledgee or its nominee. It is the technicality of the shares being registered in the name of the pledgee or its nominees that purports to prevent the real shareholders from exercising their rights as shareholders.

And so it is seen that on the one had the respondents contend that their only interest in the company is in the project. They insist that they have no other interest or involvement with the companies. Even though all the issued shares are registered in the nominee company they certainly are not holding out that they control the companies. In fact they deny

any such role. On the other hand they say that they hold the shares of the company to the exclusion of the rights of the real owners of the shares. That is blowing hot and cold. I think that the respondents are estopped from denying that the 2nd and 3rd petitioners are the owners of the shares now held by the MBf Nominee company. They should be deemed to be the shareholders and as such are *prima facie* entitled, as was *inter alia* the allottee in *Re JN 2 Ltd* to petition to wind up under s. 217(1)(c) read with the definition of "contributory." That the company should not recognise that shares are held in trust is, in the context, neither here or there. The company is not being asked to recognise the trusteeship. It is the respondents and the Court that is being asked to recognise the true status of the 2nd and 3rd petitioners *vis a vis* the shares, that they are the real shareholders.

As to what was referred to as the insolvency rule *vis a vis* a petition by contributories, i.e. that the Court will not entertain a petition by a contributory if the company appears to be insolvent, s. 221(1) of our Act (and s. 257 of the Singapore Act) provides that the Court shall not refuse to make a winding up order on the ground only, in the case of a petition by a contributory, that there will be no assets.

For the respondents great reliance was placed on the English cases, *Re Rica Goldwashing Co.* [1966] 1 All E.R. 145 and *Re Othery Construction Ltd.* [1979] 11 Ch D 36 where the insolvency rule was applied. At the time these two cases were disposed of (in 1879 and 1966 respectively) there was no provision in England similar to the last limb of our s. 221. It was only in 1980 that the amendment 2A which amounts to a similar provision to our last limb, was added on to the English section dealing with the power of the Court in winding up matters. The respondents placed even greater reliance on the Malaysian case *Kumagai Sumi Co. Ltd. v Zenecon-Kumagai Sdn. Bhd.* [1994] 2 MLJ 789 and on the Singapore case *Re Ah Yee Contractors (Pte) Ltd.* [1987] 2 MLJ 590 that followed those two English judgments. A perusal of those judgments suggests that the said s. 221(1) and s. 257 were not brought to the attention of either of the Judges. Applying that provision in s. 221(1), that there will be no assets does not *per se* provide a ground for the refusal of the winding up order sought.

Accordingly with respect I have to and do hold that the challenge to the *locus standi* of the contributory fails.

I now deal with the abuse of the process point. Shortly stated the contention is that the petitions have been brought not for the protection of the shareholders and the creditors, but for a collateral purpose to bring pressure on the respondents to bring a resolution of certain claims one Dato' Kam Woon Wah has against the Loy faction. The basis of the role of Dato' Kam in all this is not clear but for the purposes of this judgment I will assume that he has at least as much of a measure of control over Uncang and Miharja and the petitioners in both the petitions as Tan Sri Loy has on the respondents in both the petitions. What appears to be suggested, at least in reading between the lines, is that in reality Kam and Loy are the main players, puppet masters manipulating the strings behind the scene. Neither of them have affirmed any of the affidavits used in these proceedings but it would appear that it is they who call the shots.

For the respondents it is contended that the grievances that the petitioners have, call for an action in contract in the ordinary Courts. The relationship is contractual and if there have been breaches of it causing damage to the petitioners they should move the civil Courts and not misuse the process of the Companies Court. The petitioners counter this by setting out in affidavits, *albeit* well after the petitions had been filed, the petitioners and Dato Kam's version (expressed through the petitioner Hoong) of how Uncang and Miharja came to be as involved as they are with the MBf group of companies.

It is in effect contended that it was all a Loy scheme, using Dato' Kam as a front man. That is why, it is further contended, that there was the option for Tan Sri Loy to take over the two companies and to take over certain shares that Dato' Kam had in the 3rd respondent company and that when the option expired there was the sale and purchase agreement to the like effect as the option.

The Court cannot overlook the fact that there had in fact been the option which appears to have been replaced by the sale and purchase agreement on the very day that the option expired. To suggest that that was a coincidence is asking for too much and Encik Narayanan has certainly not suggested that. In the light of the existence of that option and that sale and purchase agreement which included the Kam Woon Wah shares in the 3rd respondent, the Court cannot reject *in limine* the contention by the 2nd and 3rd petitioners that they had allowed the respondent to run the project as they pleased because the intention was that under the leadership of Tan Sri Loy, the two companies and the project were to be taken over by the respondents or by Tan Sri Loy himself. I cannot at this stage, on the evidence before me, hold that it is farfetched for the 2nd and 3rd petitioners to expect the Court to accept that it was only after they had realised that the Loy faction were no longer interested in the two companies that they were forced to and had changed their posture *vis a vis* the companies. They in effect say that there was no doubt the monthly progress reports but it is contended that that was by way of mere lip service as neither the directors nor shareholders or Kam Woon Wah were really concerned with what was going on because it was in the contemplation of the parties that the Loy faction or Loy himself would be taking over the two companies and the project lock stock and barrel.

In support of their contention that the respondents ran the project as if it was that of a subsidiary of the MBf group the petitioners contend that the awarding of contracts to various companies of the group was made through pseudo tender exercises.

The respondents counter this serious complaint by contending that it was independent consultants who had awarded the tenders. However the letters written by the so-called independent consultants in respect of the tender exercise does suggest that the decision in respect of the tenders were taken not by them but by the 7th respondents. The awards were on the face of those letters made by the consultants not as their decision but as instructed by the 7th respondents. On the evidence before the Court it cannot at this stage be held as baseless the complaint that the tender exercises were contrived.

I need only now refer to one other aspect of the matter, to the projections showing a projected loss of RM21 million. The projection was by the managers of the project MBf Property Services Sdn. Bhd. The scenario as presented by Hoong the 2nd petitioner in 28-93-94 is that when his side realised that Tan Sri Loy was after all not going to take over Uncang and Miharja and the project, he wrote his letter of 6th November 1993 stating therein *inter alia*, "Since the sale and purchase agreement had not been carried out by the purchasers, we are therefore compelled to resume our responsibilities as directors of the company under the law" and asked for the current financial position "because we are very disturbed by market rumours that the above project might have incurred substantial losses." Hoong asked for the latest position and forecast.

MBf Property Services Sdn. Bhd.'s reply to this was dated 7 December 1993 to which was enclosed the financial position with a forecast of what the position would be after the completion of Phase III. It showed that the project had taken a loss of some RM51 million and on completion of Phase III the loss would be reduced but that there would be a loss of some RM21 million.

It was only after the petition was filed stating therein *inter alia* that it was forecast that there would be such a loss that the respondents disclosed a valuation by the valuers Khong & Jaafar that predicted that Phase III would result in the project making profit. What the effect of the Khong & Jaffar valuation which it would seem the respondents had with them when they provided the petitioner with the said projection is obviously something that has to be given due consideration. Why it was not disclosed to the petitioner earlier, particularly when it shows that a profit could be made, has not been explained. In any event, there is the valuation that the petitioners have procured from another valuer which forecasts that completion and sale proceeds of Phase III would not redeem the project and that it would take a substantial loss. It is not for the Court at this stage at the threshold of the petition, to decide which of the valuations (if any) should be accepted. But there can be no doubt that in the light of what is before the Court it is not possible to hold that the complaints by the petitioners are baseless or obviously unsustainable. The abuse of process point fails.

On the facts placed before the Court I am of the view that there should be an independent full and critical investigation of the whole of the affairs of the two companies and of the project. To allow the debenture holder to appoint receivers and managers will have the effect of thwarting the right of petitioners to have the company put in the hands of liquidators. The debenture holders should be restrained until the disposal of the petition or further order from appointing receivers and managers. As to the project itself and the related contracts I am inclined to place the whole thing in the hands of provisional liquidators but I would like to hear the parties on that before I make any decision on that.

The following orders are made:

(1) The applications and each of them, to strike out the petitions are dismissed with costs.

(2) The order that had been made earlier restraining the petitioners from prosecuting the petition is set aside.

(3) There will be an order in terms of enclosure (4) in each petition.

(4) As to enclosure (50) in 28-93-94 and enclosure (42) in 28-83-94 I would like to hear further submissions. The previously made gagging order restraining the publicity of these petitions and these proceedings is revoked. The petitioners are given leave to advertise and gazette the petitions.

(5) There will be a certificate for two Counsel.

(6) The petition will be heard on 21 December 1994.

(7) The petitioners are at liberty to file a new application in respect of the appointment of provisional liquidator which I direct - if it is to be filed, be filed in good time to be heard with the said enclosure (50) and enclosure (42) which I direct be called for disposal on 15 October 1994 in open Court.

Postcript

In respect of Encik Narayanan applying for leave to appeal the orders made, leave is granted. In respect of his application for stay of the orders made pending appeal, it is refused save that I order a stay of advertising and gazetting the petition until after the disposal of any appeal or application to the Court of Appeal against the refusal to order a stay of the orders made pending appeal and/or the refusal to order a stay of the hearing of the petition, or until further order.